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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Case No. .....

MARIE BALDASARRO,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS TENTH APPELLATE DISTRICT, FRANKLIN COUNY, OHIO

The petitioner Marie Baldasarro prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Tenth Appellate District of Ohio entered in the this proceeding on July 7, 1975. The Supreme Court of Ohio dismissed petitioner's appeal from said Court of Appeals without hearing on October 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Appellate District of Ohio, not reported, appears in the Appendix hereto. No opinion was rendered by the Court of Common Pleas of Franklin County, Ohio, which was the trial court in this cause.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The judgment of the Court of Appeals

for the Tenth Appellate District of Ohio was entered on July 7, 1975. A timely appeal to the Supreme Court of Ohio was dismissed on October 24, 1975, less than ninety days have elapsed since that dismissal.

QUESTIONS PRESENTED

1. When the affidavit for a search warrant relies upon allegations obtained from a confidential informant but provides absolutely no information as to the underlying circumstances which led the informant to believe that illegal activity was taking place, are those allegations sufficient to establish the probable cause required by the Fourth and Fourteenth Amendments to the Constitution of the United States for the issuance of a search warrant?
2. When the affidavit for a search warrant relies upon a confidential informant's tip which is insufficient in and of itself to establish probable cause, and said tip is substantiated in only minimal details of totally innocent activity, is the affidavit still insufficient to establish the probable cause required by the Fourth and Fourteenth Amendments to the Consttiution of the United States?
3. When police officers exceed the scope of a search warrant and seize items which are purely personal in nature, does this activity taint the search as a whole rendering the items seized pursuant to the warrant inadmissible as evidence?
4. When police officers deliberately refuse to comply with statutory requirements for the handling of items seized pursuant to a search warrant, does such deliberate refusal taint the search within the purview of the Fourth and Fourteenth Amendments and render the items seized inadmissible as evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV, Constitution of the United States

> The right of the people to be secure in their persons, houses, papers and effects, against the unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV, Section 1, Constitution of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws.

Rule 41(D), Ohio Rules of Criminal Procedure (Anderson, 1974)

> (D) Execution and return with inventory.
>
> The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the

person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Property seized under the warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant.

STATEMENT OF THE CASE

On October 3, 1974, Sergeant Jack Harris of the Franklin County Ohio Sheriff's Department, accompanied by Detective Harold Crabtree of the Columbus Police Department and other law enforcement personnel served a search warrant upon 2661 Alder Vista Drive in Franklin County, Ohio, and the person of Marie Baldasarro for "gambling paraphernalia, number memorandum slips, tapes and related materials, in violation of Ohio Revised Code §2015.02". The warrant had been obtained by the Municipal Court of Franklin County, Ohio, on the basis of the following affidavit:

> The facts upon which such belief is based are as follows: Information received from a reliable informant who has given factual and reliable information in the past resulting in arrests and convictions for gambling-related offenses in the City of Columbus and the County of Franklin within the past year stated the following to Officers Richard Byrd #491, Harold Crabtree #50 and St. Jack Harris, S-9, of the Franklin County Sheriff's Department, that one Marie Baldasarro (sic) is taking numbers bets over the phone at phone number 891-9304 at 2661 Alder Vista Drive, Minerva Park, Franklin County, Ohio. The numbers are being taken between the hours of 6:00 a.m. and 11:00 a.m., Monday through Friday. Information received from the reliable informant was on July 25, 1974. The operation is being conducted in her home at 2661 Alder Vista Drive, and possibly with water soluable paper.

BLEED THR

In the afternoon on Tuesdays she makes her weekly money pick-up at 278 N. Monroe Avenue, from a person known to the informant as 'Donald'. The informant further states that Donald, with the assistance of his mother, known only to the informant by the name of 'Grandma' is conducting a numbers operation which is turned over Monday through Friday to Marie Baldasarro (sic).

a 24-hour/day investigation was started on August 1, 1974, and revealed the following information: that one Marie Baldasarro (sic) does live at 2661 Alder Vista Drive and that she is at home Monday through Friday between the hours of 6:00 a.m. and 11:30 a.m. Investigation further revealed that on Tuesday the subject would leave her house between the hours of 11:45 a.m. and 12:30 and drive to 278 N. Monroe Avenue, Columbus, Ohio. This pattern held true up until a search warrant was executed on her sister, one Phyllis Moretti, on September 6, 1974. Marie Baldasarro (sic) then switched the day to Wednesday that she would go to 278 N. Monroe Avenue. This pattern held true up and through October 2, 1974, when she arrived at the 278 N. Monroe address at 2:00 p.m. on Wednesday, October 2, 1974.

The phone number 891-9304 was called repeatedly between normal numbers-operation hours and found to be busy.

Investigation further revealed that the person referred to as 'Donald' is one Donald Poindexter of 278 N. Monroe Avenue, who has been arrested in the past for number-related charges and 'Grandma' was identified as Alvena Poindexter, mother of one Donald Poindexter, of 278 N. Monroe Avenue, who has been arrested for numbers-related charges. She was arrested on 3/23/73 after a search warrant had been executed for 278 N. Monroe Avenue, for gambling paraphernalia, numbers slips, memorandums and related material, and was convicted on 10/11/73.

This pattern is consistent with that used by persons in the numbers scheme of chance. Personal observations by this officer have shown that numbers

> operators take bets in the morning until approximately 11:00 a.m. with 11:00 a.m. 12:00 p.m. being cut-off time which is normally used by numbers operators because some of the stock market averages become available around 12:00 p.m. The stock market averages are used to determine the winning numbers bet. This pattern has been observed as late as October 2, 1974, and is consistent with the patterns commonly observed by members of the Columbus Sheriff's Department which is used by persons associated with the operation of a numbers game by means of a telephone.
>
> Based on the above information I have reasonable and probable cause to believe that a numbers operation is being conducted inside the residence located at 2661 Alder Vista Drive. It is therefore respectfully requested that this search warrant be issued to search Marie Baldasarro (sic) and the residence at 2661 Alder Vista Drive and curtilage.

Seized were 35 slips of paper, 5 pads, 4 Bic pens, an adding machine, 15 packages of "numbers slips", a notice from Columbus and Southern Ohio Electric Company and a receipt. No verified inventory was returned although the officers involved in the search were aware of their duty to make and file such an inventory.

On the basis of the aforementioned search petitioner was indicted on charges of Gambling (2 counts) and operating a Gambling House (1 count). Petitioner's motion to suppress the evidence upon all the grounds set forth in the Questions Presented section of this petitioner was overruled by the trial court. Petitioner was subsequently convicted upon all charges. The conviction was affirmed upon an appeal to the Court of Appeal for the Tenth Appellate District of Ohio which dealt expressly with these issues. The Supreme Court of Ohio declined to review the decisions of the lower courts.

ARGUMENT

1. THE COURTS OF OHIO HAVE DECIDED THE FOURTH AMENDMENT ISSUES HERE PRESENTED IN A MANNER INCONSISTENT WITH *AGUILAR V. TEXAS*, 378 U.S. 108 (1964) AND *SPINELLI V. UNITED STATES*, 393 U.S. 410 (1969).

Aguilar v. Texas, 378 U.S. 108 (1964) should be dispositive of the first question of law set forth by the petitioner. Clearly, the affidavit here gives absolutely no information as to the source of the informant's source of knowledge. Thus, the affidavit fails the so-called two prong test set forth in *Aguilar v. Texas, supra* at page 10:

> "Although an affidavit may be based on hearsay information and need not reflect the personal observations of the affiant, . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the (items to be seized) were from which the officer concluded that the informant was 'credible' or his information 'reliable'."

Spinelli v. United States, 393 U.S. 410 (1969) is still the authoritative word for the second question posed by the petitioner. The affidavit here is long on words but short on substance. The informant's tip is no more than an unsupported allegation of illegal activity being conducted out of the petitioner's residence in the mornings. The independent police investigation revealed no more than that

1. petitioner stays at home in the morning,
2. phone number 891-9304, whoever has or had it, is frequently busy in the morning and
3. at least once a week on a Tuesday or Wednesday petitioner went to the address at 278 N. Monroe.

With all the excess verbage stripped away, the affidavit contains less information than the affidavit found insufficient in *Spinelli, supra.*

2. THIS CASE PRESENTS QUESTIONS NOT HERETOFORE DECIDED BY THIS COURT.

Rule 41(d) of the Ohio Rules of Criminal Procedure closely parallels Rule 21(d) of 18 U.S.C. Thus, a decision as to the consequences of willful failure to comply with such a rule would provide specific guidance to the federal court system and to the many state courts which must interpret analagous rules as to the conduct of a search.

This court has not decided if police misconduct after the items to be seized are in police custody has Fourth Amendment ramifications. A decision upon this issue would provide guidance for all persons involved in the criminal justice system.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Appellate District of Ohio.

Respectfully submitted,
TYACK, SCOTT & COLLEY
THOMAS M. TYACK
Attorney for Petitioner

APPENDIX A

THE SUPREME COURT OF OHIO

1975 Term

October 24, 1975

No. 75-840

APPEAL FROM THE COURT OF APPEALS

for Franklin County

STATE OF OHIO,

Appellee,

vs.

MARIE BALDASARRO,

Appellant.

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of ____ 19__

_____ Clerk

_____ Deputy

APPENDIX B
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 75AP-29

STATE OF OHIO,
Plaintiff-Appellee,

v.

MARIE BALDASARRO,
Defendant-Appellant.

DECISION

Rendered on June 17, 1975

GEORGE C. SMITH, *Prosecuting Attorney*,
ALAN C. TRAVIS and
DAVID GRAEFF, *Assistants*,
Franklin County Hall of Justice,
369 South High Street,
Columbus, Ohio,

For Plaintiff-Appellee.
TYACK, SCOTT & COLLEY,
THOMAS M. TYACK,
536 South High Street,
Columbus, Ohio,

For Defendant-Appellant.

REILLY, J.

This is an appeal from a judgment of the Court of Common Pleas, Franklin County, Ohio.

The record indicates that on October 3, 1974, Detective Harold Crabtree of the Columbus Police Department and Sergeant Jack Harris of the Franklin County Sheriff's Department, along with other law enforcement officers,

served a search warrant upon 2661 Alder Vista Drive and curtilage, Franklin County, Ohio and Marie Baldassarro [sic]; for "gambling paraphernalia, numbers memorandum slips, tapes and related materials." It was stated on the affidavit of Sergeant Jack Harris, Franklin County Sheriff's Department, that the inventory of items seized included the following:

"(1) 35 slips of paper—5 pads—4 vic [sic] pins [sic]
"(2) Adding Machine
"(3) 6 packages of numbers slips
"(4) 8 packages of numbers slips
"(5) 1 package of numbers slips
"(6) Col's & Southern Notice
"(7) 1 receipt."

Whereupon, the case was tried to the court. Appellant was found guilty of Gambling Second Offense (R. C. 2915.02); and Operating a Gambling House Second Offense (R. C. 2915.03). Motions to suppress and discharge for delay of trial were overruled. The trial court granted leave to the state to amend the indictment. There was an objection to this ruling.

This appeal was perfected, including five assignments of error

The first assignment of error is advanced as follows:

> "The trial court erred in overruling appellant's motion to suppress since the items in question were seized as part of an illegal search and seizure within the purview of the Fourth and Fourteenth Amendments to the Constitution of the United States."

The issue, as this court has stated many times, is probable cause; considering the totality of facts and circumstances of this case. Recently, in *State v. Karr*, unreported case number 74AP-296, Judge Whiteside wrote, beginning at page 7 of the decision:

> "The basic test which must be applied in determining whether an affidavit for a search warrant is sufficient to meet constitutional standards are established by *Aguilar v. Texas* (1964), 378 U. S. 108; 84 S. Ct. 1509, and *Spinelli v. United States* (1968), 393 U. S. 410; 89 S. Ct. 584. The appropriate test to be applied is set forth in *Aguilar*, at page 1514, as follows:
> " 'Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant [citation omitted], the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation omitted], was "credible" or his information "reliable." ' "

We are aware, of course, that the Supreme Court of Ohio has ruled that merely stating the informant's information is based upon his personal first-hand knowledge is not enough. *State v. Joseph* (1971), 25 Ohio St. 2d 95; *State v. Brehm* (1971), 27 Ohio 2d 239. A rule of reason is implicit, however, in *State v. Haynes* (1971), 25 Ohio St. 2d 264, wherein Chief Justice O'Neill wrote, at pages 268-269 of the opinion:

> "Reliability and credibility are nebulous matters. No exact rule can be laid down as a guideline for the determination of such questions. Each case must be judged upon its own merits.
> "Although the fact that the informant *has previously* supplied reliable information carries some weight, the determination of reliability or credibility can not be based solely upon that fact. To so hold would necessarily do away with informants since no one could ever qualify as a reliable informant the first

time. In determining the reliability of the information, the magistrate must consider the facts presented to him, and if such facts would cause a reasonable man to believe there are grounds for believing that the contraband is on the premises sought to be searched, he is justified in believing in the reliability of the informant. It must be remembered that the probable cause necessary to justify the issuance of a search warrant requires less facts than are necessary for conviction, and the amount and method of proof is less strict. *Jones v. United States* (1960), 362 U. S. 257."

The affidavit, which we recognize as crucial in this appeal, is quoted verbatim, to avoid misunderstanding and unnecessary reiteration:

"The facts upon which such belief is based are as follows: Information received from a reliable informant who has given factual and reliable information in the past resulting in arrests and convictions for gambling-related offenses in the City of Columbus and the County of Franklin within the past year stated the following to Officers Richard Byrd #491, Harold Crabtree #50 and Sgt. Jack Harris, S-9, of the Franklin County Sheriff's Department, that one Marie Baldassarro [sic] is taking numbers bets over the phone at phone number 891-9304 at 2661 Alder Vista Drive, Minerva Park, Franklin County, Ohio. The numbers are being taken between the hours of 6:00 am and 11:00 am, Monday through Friday. Information received from the reliable informant was on July 25, 1974. The operation is being conducted in her home at 2661 Alder Vista Drive, and possibly with water soluable paper.

"In the afternoon on Tuesdays she makes her weekly money pick-up at 278 N. Monroe Ave., from a person known to the informant as 'Donald.' The informant further states that Donald, with the assistance of his mother, known only to the informant by the name

of 'Grandma' is conducting a numbers operation which is turned over Monday through Friday to Marie Baldassarro [sic].

"A 24-hour day investigation was started on August 1, 1974, and revealed the following information: that one Marie Baldassarro [sic] does live at 2661 Alder Vista Drive and that she is at home Monday through Friday between the hours of 6:00 am and 11:30 am. Investigation further revealed that on Tuesdays the subject would leave her house between the hours of 11:45 am and 12:30 pm and drive to 278 N. Monroe Ave., Columbus, Ohio. This pattern held true up until a search warrant was executed on her sister, one Phyllis Moretti, on September 6, 1974. Marie Baldassarro [sic] then switched the day to Wednesday that she would go to 278 N. Monroe Avenue. This pattern held true up and through October 2, 1974, when she arrived at the 278 N. Monroe Avenue address at 2:00 pm on Wednesday, October 2, 1974.

"The phone number 891-9304 was called repeatedly between normal numbers-operation hours and found to be busy.

"Investigation further revealed that the person referred to as 'Donald' is one Donald Poindexter of 278 N. Monroe Avenue, who has been arrested in the past for numbers-related charges and 'Grandma' was identified as Alvena Poindexter, mother of one Donald Poindexter, of 278 N. Monroe Avenue, who has been arrested for numbers-related charges. She was arrested on 3/23/73 after a search warrant had been executed for 278 N. Monroe Avenue for gambling paraphernalia, numbers slips, memorandums and related material, and was convicted on 10/11/73.

"This pattern is consistent with that used by persons in the numbers scheme of chance. Personal observations by this officer have shown that numbers operators take bets in the morning until approximately 11:00 am with 11:00 am to 12:00 pm being cut-off time which is normally used by numbers operators because some of the stock market averages become

available around 12:00 pm. The stock market averages are used to determine the winning numbers bet. This pattern has been observed as late as October 2, 1974, and is consistent with patterns commonly observed by members of the Columbus Division of Police and the Franklin County Sheriff's Department which is used by persons associated with the operation of a numbers game by means of a telephone.

"Based on the above information I have reasonable and probable cause to believe that a numbers operation is being conducted inside the residence located at 2661 Alder Vista Drive. It is therefore respectfully requested that this search warrant be issued to search Marie Baldassarro [sic] and the residence at 2661 Alder Vista Drive and curtilage."

Thus, we find, considering these facts and circumstances in their totality, the affidavit was sufficient to support a finding of probable cause and the issuance of the search warrant in this case. [Note also *Ohio v. Japack* (1975), unreported case number 75AP-3, decided March 25, 1975.] Moreover, we note that the inventory was not verified, in accordance with Rule 41(D) of the Rules of Criminal Procedure. Notwithstanding, this court has recently held in *State v. Moretti, et al,* unreported cases numbers 73AP-440—73AP-442, that a violation of this provision does not impose a per se exclusionary rule, excluding the items seized. The facts of this case do not warrant the application of such exclusionary rule. Therefore, appellant's first assignment of error is overruled.

Appellant's second, third, fourth and fifth assignment of error, respectively, are as follows:

"The trial court erred in overruling appellant's motion for discharge for delay in trial."

"The trial court erred in determining that appellant had earlier been convicted of a gambling offense as

defined in Ohio Revised Code §2915.01."
"The trial court erred in allowing the State to amend the indictment at the close of its case in chief."
"The trial court erred in finding the appellant guilty because the State had failed to carry its burden of proof."

They are interrelated based essentially upon the judgment and discretion of the trial court. Hence, they are considered together. In sum, we do not find prejudicial error by the trial court.

As to the second assignment of error, the three-count indictment specifically included felony offenses. Moreover, it is emphasized that there was no surprise; and the parties were not, in any manner, misled concerning the nature of the charges involved. Consequently, appellant's second assignment of error is not well taken.

Appellant's third and fourth assignments of error are also overruled. Whenever an error is manifest, and the true intent of legislation can relate to no other common sense usage, the trial court may amend accordingly, even in a criminal case. This is particularly applicable in this case, where the numerical or alphabetical reference concerns a clerical rather than interpretive area.

Appellant's fifth assignment of error involves the sufficiency of the evidence presented to the trial court. The testimony of Officer Harold Crabtree (Tr 33-83), Columbus Police Department Vice Squad Division, was sufficient for the trier of the facts to find appellant guilty, as noted above. The weight of the evidence and credibility of witnesses are within the province of the trial court. We again note that such determination will not be reversed by a reviewing court unless there was an absence of reasonable evidence to support the trial court's conclusion. If that is not so, and the trier of the facts had

sufficient, reasonable evidence to support the decision, an appellate court may not, in effect, usurp the trial court's function. (3 Ohio Jurisprudence 2d, 809, Sec. 819.) Whereupon, appellant's fifth assignment of error is also overruled.

Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

HOLMES and MCCORMAC, JJ., concur.

APPENDIX C
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 75AP-29

THE STATE OF OHIO,
Plaintiff-Appellee,

v.

MARIE BALDASARRO,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on June 17, 1975, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

HOLMES, REILLY and MCCORMAC, JJ.
JUDGE ARCHER E. REILLY